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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

**MAR 22 2017**

REPLY TO THE ATTENTION OF

Mr. Gary Besaw  
Chairman, Menominee Tribe of Wisconsin  
P.O. Box 910  
Keshena, Wisconsin 54135-0910

Dear Chairman Besaw:

I am writing in response to a letter of January 23, 2017, from former Chairwoman Joan Delabreau regarding the proposed Aquila Resources Inc. Back Forty Project. The letter requested that the U.S. Environmental Protection Agency require meaningful consultation between the State of Michigan and the Tribe regarding the proposed project. More specifically, the letter requests that EPA require Michigan to enter into a programmatic agreement with the Menominee Indian Tribe of Wisconsin and EPA in order to resolve federal agency objections regarding the wetland permit required by section 404 of the Clean Water Act (CWA), and require a study, under Section 106 of the National Historic Preservation Act (NHPA), of traditional and cultural properties which would be impacted by the project.

In the case of the Back Forty Project, EPA does not have the authority to enter into such an agreement. Section 106 of the NHPA requires federal agencies to take into account the effects of federal undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. As currently proposed, the Back Forty Project requires no federal undertaking because all of the permit decisions for the project are the responsibility of the State of Michigan under federally approved state authorities covering the National Pollutant Discharge Elimination System (NPDES) permit program (Section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342), the wetlands/dredge and fill permit program (Section 404 of the CWA, 33 U.S.C. § 1344), and Title 1 of the Clean Air Act (42 U.S.C. § 7475). EPA retains an oversight role to review the State's permits and ensure their consistency with these federal statutes. In addition, Michigan maintains state authority to issue mining permits under Part 632 of its Natural Resources and Environmental Protection Act. EPA does not have authority to oversee the State's Part 632 permits. Because the final permit decisions made under all of these authorities are State decisions, they are not subject to NHPA review.

While there is no basis for EPA to consult or to enter into an agreement with the State and Tribe pursuant to Section 106 of the NHPA, EPA would be agreeable to engaging in consultation with

the Tribe pursuant to its government-to-government consultation policy. This process would be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>).

During a February 28, 2017 telephone call in which you participated, EPA staff verbally extended an invitation to engage in government-to-government consultation on this matter, and you indicated a desire to do so. In order to schedule the consultation, your staff may contact Peter Swenson, Chief of the Watersheds and Wetlands Branch, EPA Region 5, at 312-886-0236 or [swenson.peter@epa.gov](mailto:swenson.peter@epa.gov).

The January 23, 2017 letter also requests that EPA exercise its federal oversight over the permitting processes for the proposed project. EPA has exercised its discretionary authority to engage with the Michigan Department of Environmental Quality (MDEQ) on each of the three permits required by federal law:

Clean Air Act Permit: During the public comment period, EPA provided MDEQ a comment letter dated October 26, 2016, stating concerns with some of the draft air construction permit conditions. As part of its permitting process, MDEQ provided a response to comments document addressing EPA's comments and all comments received during the public comment period at time of final air construction permit issuance. MDEQ revised certain permit conditions to address EPA's concerns.

Clean Water Act Section 402 Permit: EPA provided comments on the draft NPDES permit during the public comment period. In accordance with EPA's Memorandum of Agreement with MDEQ for the NPDES permit program, we received a revised version of the permit and MDEQ's responses to comments from MDEQ on February 1, 2017. EPA is in the process of reviewing the revised draft permit and MDEQ's responses to the comments received during the public comment period that concern the draft NPDES permit.

Clean Water Act Section 404 Permit: In August 2016, EPA objected to MDEQ issuing a Wetlands and Inland Lakes and Streams Permit under its assumed CWA Section 404 program. Aquila Resources Inc. subsequently withdrew its MDEQ permit application. In January 2017, Aquila Resources Inc. re-applied to MDEQ.<sup>1</sup> After finalizing its completeness review, MDEQ will issue a public notice, at which time, the public, tribes, and EPA will have an opportunity to provide comments. EPA will provide a thorough review of the revised permit application.

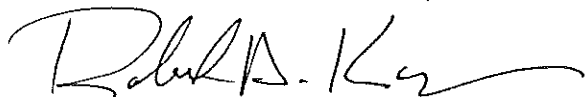
EPA will continue to exercise its oversight with respect to the Clean Air Act and Clean Water Act permits, and Region 5 staff would be available to discuss concerns you have with these permits, as discussed above.

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<sup>1</sup> The permit application can be found in MDEQ's MiWaters database at <https://miwaters.deq.state.mi.us/miwaters/#/external/home> by searching the map application for "55-Aquila Resources."

Thank you for your interest in this matter. If you have further questions, please contact Peter Swenson, at 312-886-0236 or [swenson.peter@epa.gov](mailto:swenson.peter@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Kaplan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert Kaplan  
Acting Regional Administrator